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**OCT 31 1996**

**FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054

In the Matter of )  
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Definition of Markets for Purposes of the )  
Cable Television Mandatory Television )  
Broadcast Signal Carriage Rules )  
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CS Docket No. 96-178

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COMMENTS ON THE FURTHER  
NOTICE OF PROPOSED RULEMAKING

NATIONAL ASSOCIATION OF BROADCASTERS  
1771 N Street, N.W.  
Washington, D.C. 20036

Henry L. Baumann  
Benjamin F.P. Ivins

Counsel

Mark Fratrack, Ph.D.  
Vice President, Economist

October 31, 1996

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COMMENTS ON THE FURTHER  
NOTICE OF PROPOSED RULEMAKING

The National Association of Broadcasters ("NAB")<sup>1</sup> hereby submits its comments  
in the above-captioned proceeding.

**INTRODUCTION**

In its comments and reply comments in this proceeding,<sup>2</sup> NAB urged the  
Commission to amend its rules to substitute the use of Nielsen Media Research's  
"Designated Market Areas" ("DMAs") for the now defunct Arbitron "Areas of Dominant  
Influence" ("ADIs") in time for use in the must carry/retransmission consent elections

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<sup>1</sup> NAB is a nonprofit, incorporated association of television and radio stations and networks which serves and represents the American broadcast industry.

<sup>2</sup> *Comments of the National Association of Broadcasters* in CS Docket No. 95-178, filed February 5, 1996 (hereafter "NAB Comments"); *Reply Comments of the National Association of Broadcasters* in CS Docket No. 95-178, filed February 26, 1996 (hereafter "Reply Comments").

required by October 1, 1996. NAB also recommended that individual ad hoc market modifications issued pursuant to Section 614(h) of the Communications Act should be kept in force unless or until changed circumstances were demonstrated to justify alternations to such modifications. Regretfully, the Commission chose to defer substituting the use of DMAs to define markets for must carry until 1999.<sup>3</sup> It now asks for comment and suggestions on how to facilitate the 1999 transition from ADIs to DMAs.

### **ARGUMENT**

The concerns expressed in the *Further Notice* about the dimensions of the problems that the transition from ADIs to DMAs will create are, at this point, largely hypothetical and overstated.<sup>4</sup> Certainly the situation in 1999-2000 will not be nearly as volatile as it was in 1993, when all stations and all cable systems went from no must carry, to a must carry regime based upon ADIs. In 1999-2000 the majority of stations and cable systems will be unaffected by the switch to DMAs. Nielsen's DMAs were no more or less created or designed expressly for the purpose Congress intended for must carry than were Arbitron's ADIs. That is why Congress created the Section 614(h) market modification provision. NAB is unaware of any major criticisms that have been raised with how the

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<sup>3</sup> *Report and Order and Further Notice of Proposed Rulemaking* in CS Docket No. 95-178, released May 24, 1996 (hereafter "Further Notice").

<sup>4</sup> The Commission's concern about problems it predicts will arise in connection with the transition from ADIs to DMAs, especially in the context of perceived problems with Section 614(h) petition procedures, is, in a sense, ironic in that its decision to defer the transition until 1999 may create at least some of the very problems about which it seeks comment. See *NAB Reply Comments* at 4.

Commission's 614(h) procedures have implemented that provision with respect to ADIs. There is no reason currently to believe they will not work equally as well to make any needed adjustments to DMAs. Accordingly, the adage "if it ain't broke, don't fix it" would seem to apply.

On the issue of what effect changing to DMA market definitions should have on previous Section 614(h) decisions, and decisions that will be made during the election cycle beginning January 1, 1997, the answer is simple - None! The comments and reply comments filed thus far in this proceeding are virtually unanimous on this point.<sup>5</sup> The reason is clear. Some must carry zones established by ADIs or DMAs are admittedly imperfect because ADIs and DMAs were not designed expressly for the purposes Congress intended for must carry. Where a station or cable system has been subjected to an extensive specific community-by-community Section 614(h) analysis that took into account the very factors Congress deemed relevant for must carry, decisions reflecting that analysis should remain in effect unless, or until, a subsequent Section 614(h) proceeding demonstrates that a further modification is required. A hypothetical cable operator facing hypothetical conflicting carriage obligations such as that referenced in ¶44 of the *Further Notice* presumably would be a candidate for such further modifications.<sup>6</sup>

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<sup>5</sup> See, e.g., *Further Notice* at 44; *NAB Comments* at 11-12.

<sup>6</sup> Virtually the only non-hypothetical situation referenced in the *Further Notice* ostensibly justifying the need to modify the Commission's Section 614(h) procedures to accommodate a transition to DMAs is that in Hagerstown/Washington, D.C. A review of WHAG-TV's *Comments* and NAB's *Reply Comments* in this proceeding reveal that the conversion to DMAs will, for a variety of reasons consistently ignored by the Commission, probably have a negligible effect on that situation. See *Comments of Great Trials Broadcasting Corp.* at 6; *Reply Comments of NAB* at 5-6.

NAB strongly opposes the proposal set forth in ¶52 of the *Further Notice* that would mandate that each Section 614(h) petition include exhibits showing all of the factors listed in ¶52. Such a mandate could unnecessarily impose extraordinary costs and burdens on petitioners, even in situations where the market modification request is unopposed. For example, requiring a station to submit documents such as rate cards and listings of cable system channel line-ups for a several year period could be unduly burdensome in that stations have no easy and discernible access to such documents. Similarly, requiring stations to file published audience data would be problematic for a station not subscribing to the service publishing the data.

In an era when deregulation and a reduction in the amount of paper required by the government is being encouraged, this proposal drastically to increase the paper required to be filed seems an anomaly, particularly since the purported reasons for such requirements are unclear. First, the *Further Notice* suggests such required filing would be a new technique needed to increase the efficiency of the Section 614(h) decision making process if “a continuing flow of modification requests is filed.”<sup>7</sup> Of course, there is no evidence this will occur. Presumably if, and when, the Commission is confronted with an unmanageable number of petitions, then more onerous filing requirements should perhaps be considered.

Second, the Commission is apparently concerned that, under current procedures, “a party is free to make its case using whatever evidence it deems appropriate.”<sup>8</sup> That

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<sup>7</sup> *Further Notice* at ¶52.

<sup>8</sup> *Id.*

observation applies equally to virtually any Commission proceeding and, indeed, to any judicial proceeding in which a moving party bears the burden of proof. But rarely, if ever, are such parties compelled to produce specific types or categories of evidence and exhibits. While a party may be free to submit whatever evidence it deems appropriate, the sanction for failure to produce adequate evidence is the denial of its Section 614(h) petition.

While NAB would not oppose a suggested list of the types of evidence the Commission would find useful in considering a Section 614(h) petition,<sup>9</sup> a required list of exhibits or other evidence justified by mere speculation that the level of such petitions may increase in unwarranted.<sup>10</sup>

A second proposed means of increasing efficiency in the Section 614(h) petition process is to alter “to some extent” the burden of producing the relevant evidence by permitting the party seeking the market modification to establish a *prima facie* case based on limited factual data relevant to the statutory criteria which an opposing party would then be obliged to rebut. While it is not entirely clear how this proposal materially differs from current practice, NAB would generally favor any procedural modifications designed to simplify and expedite the market modification process, so long as due process is preserved.

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<sup>9</sup> In other words, NAB supports maintaining the status quo under which the Commission has suggested the type of information referenced in ¶52 of the *Further Notice* that it would find useful in reviewing Section 614(h) petitions. 8 F.C.C. Rcd. 2965 at 2977.

<sup>10</sup> NAB strongly opposes the proposal that pledges to provide quantitative amounts of public interest programming should result in preferences being awarded in market modification cases. *Further Notice* at fn. 33. There is no statutory basis for such a preference and it would be subject to a context-based constitutional challenge.

Only a brief comment is needed to respond to the issue raised in the *Further Notice*, as to whether the Commission should accord some sort of different or extraordinary treatment to DMA assignments made by Nielsen when they are based on considerations other than viewing patterns.<sup>11</sup> The answer is no. In these presumably rare situations it appears Nielsen has adopted its version of the Section 614(h) procedures. The results of any Nielsen DMA assignments, whether they be based on viewing patterns or other considerations, can and should always be subject to challenge by a station or cable system if the assignment fails to meet the Section 614(h) criteria. The key issue is whether the DMA assignment accurately reflects a station's real market for must carry purposes. If it does, how Nielsen arrived at that assignment would seem largely irrelevant.<sup>12</sup>

Finally, for reasons not totally clear, the Commission has chosen DMA assignments specified in the *1997-1998 DMA Market and Demographic Rank Report* for use in the 1999 must carry/retransmission consent elections. This report will be released in the summer of 1997. The bad news is that station carriage starting in the year 2000 will be based upon market data that is over two years old. The good news is that stations and cable systems will have over two years to digest the 1997-1998 DMA designations and to seek modifications thereto before they have to make their elections.

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<sup>11</sup> *Further Notice* at ¶50.

<sup>12</sup> Arbitron also had a petition procedure to modify ADIs for which no extraordinary Commission treatment was deemed necessary.

## CONCLUSION

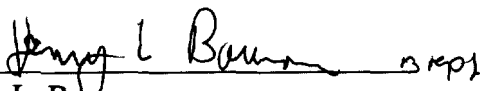
Little, if any, changes to the Commission's rules are warranted by the conversion to DMAs that would apply to must carry/retransmission consent elections effective in the year 2000.

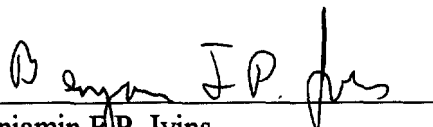
The Commission should continue to recognize all past and future Section 614(h) determinations prior to the conversion to DMAs unless they are superseded by the results of a subsequent Section 614(h) proceeding.

Under no circumstances should the Commission mandate specific types of evidence or documents that must be submitted in connection with a Section 614(h) proceeding.

Respectfully submitted,

NATIONAL ASSOCIATION OF  
BROADCASTERS  
1771 N Street, N.W.  
Washington, D.C. 20036

  
Henry L. Baumann  
Executive Vice President  
and General Counsel

  
Benjamin H.P. Ivins  
Assistant General Counsel

Counsel

Mark Fratrack, Ph.D.  
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